Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Section 224 of the Act	)	**WC Docket No. 07-245**
	)	
A National Broadband Plan for Our Future	)	**GN Docket No. 09-51**
	)	

To: The Commission

REPLY COMMENTS OF THE COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
National Grid
NSTAR
PPL Electric Utilities
South Dakota Electric Utilities
Wisconsin Public Service Company

Jack Richards
Thomas B. Magee
Wesley Wright
Keller and Heckman LLP
1001 G Street, NW, Suite 500 West
Washington, DC 20001
(202) 434-4100

Attorneys for

Coalition of Concerned Utilities

Filed: October 4, 2010

SUMMARY OF ARGUMENT

Based solely on the Broadband Staff's recommendations in the National Broadband Plan, the Commission has proposed a host of new pole attachment requirements for electric utilities that are intended to promote the deployment of broadband services across the country. Unfortunately, the Broadband Staff presented the Commission with a "wish list" for attachers as if it were noncontroversial and beyond debate, all the while ignoring the significant concerns raised by the electric utility industry. As is apparent from the Comments filed in this proceeding, these proposals would do very little if anything to promote broadband services, and almost all of them would jeopardize the safety and reliability of electric distribution systems.

It is troubling that the full Commission would bootstrap these Broadband Staff recommendations into new proposed burdens on electric utilities without any consideration of prior input from the electric utility industry. The Broadband Staff's recommendations in the Pole Attachment section of the National Broadband Plan were so one-sided that they cannot reliably form the basis for any proposals by the Commission, let alone ones that potentially impact the safe and efficient operation of electric utility distribution systems across the country.

The Commission should pay heed to the Comments of the electric utility industry during the rulemaking phase of this proceeding and should exercise extreme caution before adopting in the name of broadband deployment any rule changes that could conceivably affect the safe and efficient delivery of electric utility services or undermine the viability of our nation's electric utility infrastructure.

Make-Ready Requirements. In its Comments, the electric utility industry explained that the make-ready deadlines recommended in the National Broadband Plan and proposed by the Commission in this proceeding are unworkable and unwise. Requiring utilities to coordinate

and schedule make-ready, to collect make-ready payments on behalf of attachers, to perform communications company make-ready themselves, to relinquish management to a single managing utility in joint ownership agreements, and to gather and make available extensive data on available pole space, is dangerous, overly burdensome, unwise and unfair to electric utilities. Electric utility distribution systems are too complex and dangerous to impose such requirements nationwide. These proposals are unfounded and would create a flood of disputes.

Most telling is that the entire cable industry expressed little if any need for these burdensome requirements, and those CLECs calling for make-ready deadlines appear to have little understanding of the make-ready process or of electric utility constraints. What is needed is for CLEC attachers to bear greater responsibility for facilitating the process, not rigid deadlines and other burdensome and dangerous make-ready constraints on utilities. The Commission should reject these make-ready proposals altogether.

Unauthorized Attachment and Safety Violation Penalties. Many Comments by the electric utility industry flagged the epidemic problem of unauthorized attachments and safety violations. The *Coalition* recommends that the Commission adopt unauthorized attachment and safety violation penalties similar to those in effect in Oregon: $100 per unauthorized attachment plus 5 years annual rental if the attacher has not participated in a required audit; $50 per unauthorized attachment plus 5 years annual rental if the attacher has participated in the audit or identifies the unauthorized attachment on its own; and $200 per safety violation. These penalty provisions could easily be imposed without the additional pole inspection and other requirements applicable in Oregon to which the cable industry objects. With certain qualifications, the *Coalition of Concerned Utilities* is willing to support the Time Warner Cable proposal that a

common baseline of attachments be established before assessing unauthorized attachment penalties.

Dispute Resolution. The *Coalition* agrees with attacher representatives that disputes should be escalated to persons with decision-making authority within the respective companies prior to filing any dispute with the Commission.

Posting Contracts. The Commission should reject proposals to require the posting of pole attachment agreements and should not permit parties to "opt in" to existing agreements on demand. Attachment agreements are complex, involve give-and-take on both sides, and raise security concerns that prevent cookie-cutter contracts.

The Telecom Rate. While communications attachers naturally applaud the Commission for proposing to lower the existing Telecom rate by artificially "removing" three of the five so-called "carrying charges," the proposed new rate methodology is contrary to the intent of Congress and poor public policy. It is unlikely to promote broadband deployment in unserved or underserved areas, but most certainly will help communications companies profit at the expense of electric utility ratepayers. Tinkering with the Telecom rate, even if it were not a violation of the statute, is no way to promote broadband in rural America, since there is no requirement that any entity use its Telecom rate subsidy to provide service. What rural America needs are specific, targeted subsidies through the USF program, not one-sided windfalls to the broadband industry. In addition to targeted subsidies, competitive broadband deployment is best accomplished by eliminating the existing unfair and inefficient Cable rate subsidy in order to level the playing field among broadband providers.

Presumptions. Sufficient evidence does not exist to change the average pole height presumption as proposed by the cable industry. As for the number of attaching entity

presumptions, the *Coalition* supports NCTA's call for reform, but not as envisioned by NCTA, whose proposal for four attaching entities is way off base. The Commission should permit utilities to develop an average number of attaching entities based upon any reasonable, well-defined geographic area, not unworkable and artificial "urbanized" and "non-urbanized" locations. Allowing flexibility would render rate calculations more accurate and help to lessen the subsidy that already exists in the Telecom rate.

Joint Use. ILECs receive considerable benefits from joint use and joint ownership agreements that third party cable and CLEC attachers do not receive, and their Comments confirm that it would be unfair for ILECs to receive the same attachment rate as cable company and CLEC attachers.

* * *

The *Coalition of Concerned Utilities* urges the Commission to consider carefully the Comments of the electric industry in the proceeding and to exercise extreme caution before adopting in the name of broadband deployment any rule changes that could conceivably affect the safe and efficient delivery of electric utility services or undermine the viability of our nation's electric utility infrastructure.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Section 224 of the Act	)	**WC Docket No. 07-245**
	)	
A National Broadband Plan for Our Future	)	**GN Docket No. 09-51**
	)	

To: The Commission

REPLY COMMENTS OF THE COALITION OF CONCERNED UTILITIES

Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., National Grid, NSTAR, PPL Electric Utilities, South Dakota Electric Utilities, and Wisconsin Public Service Company (collectively, "the *Coalition of Concerned Utilities*" or "*Coalition*"), by their attorneys, hereby reply to Comments filed in response to the Further Notice of Proposed Rulemaking ("Further Notice") released by the Federal Communications Commission ("FCC" or "Commission") in this proceeding on May 20, 2010.[1]

I. INTRODUCTION

The *Coalition of Concerned Utilities* and a wide range of other representatives of the electric utility industry filed extensive Comments and Reply Comments and made exhaustive *ex parte* presentations during development of the National Broadband Plan. Unfortunately,

---

[1] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 20, 2010), published in the Federal Register on July 15, 2010. 75 Fed. Reg. 41338.

however, virtually all of those filings were ignored by the Commission's Broadband Staff when it made its recommendations to the Commission regarding Pole Attachments. The Broadband Staff did not even pretend to be objective in the Infrastructure Chapter of the National Broadband Plan, which addressed Pole Attachments.[2]

Rarely, if ever, has a Commission-sanctioned document been so one-sided as the Infrastructure Chapter of the National Broadband Plan. In making its Pole Attachment recommendations, the Broadband Staff simply ignored the electric utility industry's concerns and presented to the full Commission a "wish list" for attachers as if it were noncontroversial and beyond debate.

Nevertheless, based solely on the Broadband Staff's recommendations in the National Broadband Plan, the Commission has proposed a host of new Pole Attachment requirements for electric utilities that are intended to promote the deployment of broadband services across the country.

The *Coalition of Concerned Utilities* urges the Commission to pay greater heed to the Comments filed by the electric utility industry during the rulemaking phase of this proceeding than the Broadband Staff did in preparing the National Broadband Plan. We urge the Commission to exercise extreme caution before adopting in the name of broadband deployment any rule changes that could conceivably affect the safe and efficient delivery of electric utility services or undermine the viability of our nation's electric utility infrastructure.

---

[2] Throughout the entire Chapter, for instance, there were a total of 38 citations to attacher comments and only 2 citations to largely non-substantive comments by the electric utility. *See* Comments of the *Coalition of Concerned Utilities* (filed August 16, 2010) at 4 and Exhibit A ("*Coalition* Comments").

II. ARGUMENT

A. The Comments In This Proceeding Demonstrate That The Commission's Make-Ready Deadlines And Other Make-Ready Proposals Are Unnecessary And Would Do Little To Promote Broadband Service

In its Comments, the *Coalition* explained how the make-ready deadlines proposed originally in the National Broadband Plan and then by the Commission were unworkable and unwise. In general, this is because electric utility distribution systems are too complex and dangerous to impose such deadlines nationwide, but also because the deadlines are unfair to electric utilities and would create a flood of disputes. The *Coalition* also explained that many of the Commission's other proposals (also originating in the National Broadband Plan), which would require utilities to coordinate and schedule make-ready, to collect make-ready payments on behalf of attachers, to perform communications company make-ready themselves, to relinquish management to a single managing utility in joint ownership agreements, and to gather and make available extensive data on available pole space, also were dangerous, overly burdensome, unwise and unfair to electric utilities.[3]

As explained more fully below, the Comments filed in this proceeding confirm that these make-ready requirements are unworkable, unwise and unnecessary. Because there is so little support and so little need for rigid deadlines and other make-ready constraints, the Commission should reject its make-ready proposals altogether.

1. The record shows that make-ready deadlines are not needed for those entities that appreciate utility constraints and understand the make-ready process

The great bulk of the Cable industry Comments in this proceeding focus on the industry's quest to receive even cheaper pole attachment rentals. They show little interest in the Commission's make-ready proposals, and confirm in general that the industry is not

[3] *Coalition* Comments at 63-76 and 81-87.

experiencing any significant make-ready delays that would require the imposition of mandatory and largely arbitrary regulatory deadlines. Quite the opposite, the Cable industry Comments show that the existing make-ready process is working quite well.

NCTA, Charter and Bright House do not express any need for make-ready deadlines, and Comcast offers only lukewarm support in a footnote.[4] Time Warner Cable, for its part, explains that they are experiencing no problem with obtaining timely access to utility poles:

> [T]he reality is that most utilities, pursuant to private contract terms or course of performance, allow attachment and complete necessary make-ready in far less time than the Commission proposes here.
>
> . . .
>
> In the majority of cases, TWC's engineering and operational teams are able to work with their counterparts at the utility to ensure that simple attachment applications are processed quickly and make-ready work is completed promptly. In TWC's experience, poles are made ready for attachment within an average timeframe of 52 days. Even in cases where the utility has to coordinate action among multiple parties with facilities on a pole or where a pole must be replaced, poles are typically ready to accommodate a new attachment well within 90 days.[5]

In other words, the cable industry appreciates utility industry constraints, understands the make-ready process and has experienced no significant problems in obtaining timely make-ready access. Cable industry engineers are able to work together with their utility counterparts to handle the great majority of attachment requests in a timely manner. They believe that the process is working just fine without further Commission intervention.

2. The few entities that are calling for make-ready deadlines need to better understand electric utility constraints and the make-ready process

The success experienced by the cable industry in obtaining timely access to distribution

---

[4] Comments of Comcast Corporation (filed Aug. 16, 2010) at 25, n.78 ("Comcast Comments")

[5] Comments of Time Warner Cable, Inc. (filed Aug. 16, 2010) at 16-17 ("TWC Comments").

poles puts in glaring perspective the anecdotal complaints of certain CLEC attachers that their requests for access are not being processed fast enough for their liking. The longstanding Cable industry success in working with utility pole owners to accomplish timely access raises serious doubts against those few CLECs complaining of make-ready delays and calling for make-ready deadlines.

CLECs calling for make-ready deadlines have little understanding of the make-ready process or of electric utility constraints. Sunesys apparently understands that there may be things that could delay a project, but they can only envision a hurricane as a possible justification.[6] As the *Coalition* explained, there are dozens of problems that can delay a make-ready project, such as the volume and erratic nature of attachment requests, electric service interruptions to existing customers, lack of available supplies to complete the job, delays caused by the process of hiring contractors, actual shortages of qualified contractors, local and state permitting and other requirements, State PUC reliability standards and other requirements, obtaining access rights from private property owners, protection of sensitive environmental areas, delays caused by existing attachers, work stoppages and construction delays, resolving unauthorized attachment issues, and many ways that the attacher itself causes delays.[7]

TWTC/Comptel claims that electric utility pole owners are "less cooperative" than ILEC pole owners in accommodating third party attachers.[8] What they fail to understand is that the make-ready process is much easier for ILEC pole owners than it is for electric utility pole owners, because electric utility make-ready work is generally more involved, takes a longer time

---

[6] *See* Comments of Sunesys, LLC (filed Aug. 16, 2010), at 9 ("Sunesys Comments") ("Moreover, Sunesys believes that except where certain extenuating circumstances exist, such as a hurricane (as discussed in greater detail in Section III (C)), utilities should not have more than 45 days to complete the make-ready work once they have received payment.")

[7] *See Coalition* Comments at 20-26.

[8] Comments of TW Telecom and Comptel (filed Aug. 16, 2010) at 14 ("TWTC/Comptel Comments").

to perform, and due to the presence of energized lines requires unique safety practices that ILECs do not have to worry about. There is far less risk in the communication space, so that strict standards are less likely to be enforced. For example, if two communication cables are spaced too closely to each other, there is not nearly as much safety, reliability and other risks as when a communications cable is spaced too closely to an energized electric primary cable. In addition, electric utilities must prioritize their work based on electric customer requests, storms, and system maintenance, which can fluctuate without regard to the number of attachment requests pending.

Fibertech proposes that the make-ready deadlines should be further shortened because in its view, pole owners do not require 14 days to develop a make-ready cost estimate after determining the required make-ready work. Fibertech claims that the estimate is "little more than affixing prices to already-determined make-ready tasks."[9] This proposal shows that Fibertech does not appreciate the complexity of the design and estimating of utility work. For large utility companies and possibly for all utilities, once the owners agree upon the required make-ready work, each owner must "design" the required make-ready work to satisfy its own construction requirements. Cost estimates are derived from the detailed design conducted after work elements are created within the utility's design system. A designer does not merely affix an established price to each make-ready work task. Furthermore, all cost estimates must undergo a review by the designer's supervisor. The process takes time, and it cannot be short-circuited to satisfy Fibertech's demand for quicker access across-the-board. It would be irresponsible to place an attacher's quest for speed to market ahead of the electric utility's obligation to maintain a safe and reliable electric system.

[9] Comments of Fiber Technologies Networks, L.L.C. (filed Aug. 16, 2010) at 5 ("Fibertech Comments").

CTIA claims that the short "shot clock" timeframes for wireless tower site collocations attachments indicate that shorter deadlines are appropriate for wireless attachments to distribution poles.[10] This apples-to-oranges proposal equates wireless tower sites, which do not contain hazardous electric distribution facilities and complex safety, reliability and operational considerations, with electric utility distribution poles, which do.

Level 3 and MetroPCS recommend that attachers be entitled to proceed with part of the attachment process even though the attacher has no contract with the pole owner and the owner may not have even authorized attachers to be present on or near the poles.[11] No entity, much less an electric utility in charge of hazardous electric distribution facilities, should be forced to incur potential liabilities without a contract in hand from all parties involved. The contract negotiation process is more than just unnecessary "paperwork;" it establishes the terms and conditions of access and sets forth each party's obligations and liabilities.

Perhaps most telling of all comments is Level 3's admission that most attachers do not even understand how pole attachment rates are calculated:

> Attempts to apply the formulas for the verification purposes are difficult, because most attaching parties have little experience with the source documents from which data is taken, or with the calculation methodology. Carriers that have tried to apply the formulas have been confronted with some uncertainty as to its details, and absent filing a pole attachment complaint, there has previously been no way of knowing exactly how the Commission staff would calculate the maximum rate under the applicable formula.[12]

If, unlike other parties, Level 3 is having difficulty understanding the Commission's pole

---

[10] Comments of CTIA – The Wireless Association (filed Aug. 16, 2010) at 8 ("CTIA Comments").

[11] Comments of Level 3 Communications, LLC Concerning the Commission's Order and Further Notice of Proposed Rulemaking (filed Aug. 16, 2010) at 7-8 ("Level 3 Comments"); Comments of MetroPCS Communications, Inc. (filed Aug. 16, 2010) at ii-iii ("MetroPCS Comments").

[12] Level 3 Comments at 8-9.

attachment rate calculation methodology, it should consider retaining the services of a qualified consultant. It is hardly justification to change the rules in Level 3's favor.

In sum, the reason that certain CLECs are complaining about the make-ready process is that they fail to understand or seek to minimize the obligations electric utilities have to maintain a safe and reliable electric system. Their self-professed admission that they do not understand pole attachment rate calculations supports their apparent lack of understanding of make-ready and electric utility work constraints.

What these CLECs are asking the Commission to do, and what the National Broadband Plan (which ignored well-founded electric utility concerns) would allow them to do, is to impose unworkable and unwise make-ready deadlines on electric utility pole owners for the benefit of CLECs based on allegations of make-ready delays that are completely belied by the entire cable industry's longstanding success in obtaining timely make-ready. The FCC's proposed "one size fits all utilities" make-ready timeframes, divorced from application size, application volume, utility size, or resulting work, irresponsibly would place pole access ahead of pole and worker safety. The recommendation of the National Broadband Plan for make-ready deadlines should be rejected.

3. Any make-ready timelines should be guidelines, not requirements

USTA and Verizon suggest that any timelines established by the Commission for make-ready should be guidelines, not firm deadlines.[13] The *Coalition of Concerned Utilities* supports

[13] Comments of the United States Telecom Association (filed Aug. 16, 2010) at 20 ("USTA Comments") ("Using guidelines with proposed timeframes for completing the various stages of the process, rather than firm deadlines, is one way of providing the flexibility needed to account for these factors."); Comments of Verizon (filed Aug. 16, 2010) at 22 ("Verizon Comments") ("Accordingly, consistent with the Commission's current approach for regulating access to poles, any new regulation for the timing of make ready work should be in the form of guidelines rather than firm deadlines.")

this proposal, recommending as well that the timelines established should be consistent with the make-ready proposal outlined in the *Coalition's* Comments.[14]

There are too many utilities, too many utility operating parameters, too many different weather and soil conditions, too many variations in local regulations, and too many countless other variables for nationwide make-ready deadlines. Guidelines may help the process in some respects, but firm deadlines will create countless disputes and cause far more problems than they would solve.

4. Make-ready payments should be paid in advance

To support their arguments for full up-front payment of make-ready costs, Ameren, Centerpoint and Dominion (the POWER Coalition) quote provisions of their tariffs that require customers to pay for relocation or other construction services up-front before any work is done.[15]

Coalition members have similar requirements. PPL's tariff regarding the Relocation of Facilities likewise requires payment in advance.[16] BGE's tariff regarding service extensions also requires payment in advance.[17]

---

[14] *See Coalition* Comments at 30-35. The *Coalition* proposed to complete field surveys of most requested pole routes within 45 days of receipt of a completed application; to complete make-ready estimates for "Non-Complex Make-Ready" within 15 days of completion of the field survey; and following payment of make-ready costs, to schedule and complete Non-Complex Make-Ready work in a manner that does not discriminate in favor of the utility's own needs or customer work except in limited circumstances.

[15] Comments of Ameren Services Company, CenterPoint Energy Houston Electric, LLC, and Virginia Electric and Power Company (filed Aug. 16, 2010) at 19-20 ("POWER Coalition Comments").

[16] "I. RELOCATION OF FACILITIES

"(1) The relocation of customer's facilities due to moving or rearranging Company's facilities at the direction of either the federal, state or local government is the customer's responsibility and expense. (2) The relocation of Company facilities, when done at the request of others, is at the applicant's expense and payment of the Company's estimated cost of the relocation **is required in advance of construction**. When the request is from an affected property owner and the facilities are on the customer's property, the charges for relocation of distribution system facilities are limited to estimated contractor costs, estimated direct labor and estimated material costs, less an amount equal to any estimated maintenance expense avoided as a result of the relocation." (emphasis added)

[17] "8.8 Payment Plans: Charges for main and service line extensions **are payable by cash in advance** or in monthly installments as specified by the Company." (emphasis added)

Consistent with these provisions, and for the reasons otherwise explained in the *Coalition's* Comments,[18] the Commission should not require electric utilities to bear the risk of financing the make-ready expenses of communications attachers. Utilities should not be required by the FCC to serve as banks for attachers. At least one attaching entity agrees that the Commission's proposal is not fair to utilities.[19] The comments of other attaching entities provide little support and no justification for this provision. The Commission therefore should reject this proposal to require make-ready payments to be made in stages and funded by utilities.

5. The other make-ready proposals of the Further Notice have received very little support and should be rejected

Along with make-ready deadlines and the payment of make-ready expenses in stages, the National Broadband Plan envisioned and the Commission proposed a set of additional make-ready rules that would supposedly facilitate the make-ready process. These rules would require utilities to coordinate and schedule make-ready, to distribute make-ready payments to existing attachers, to perform communications company make-ready work themselves, to appoint a single managing utility in joint ownership agreements, and to gather data on available pole space.

The *Coalition* explained in its Comments why these additional make-ready proposals would be unfair to utilities, dangerous, overly burdensome, unwise and in excess of Commission authority.[20] As explained, utilities have little control over existing attachers, the attachers themselves are in the best position to facilitate the process, the work required of utilities would detract from their other make-ready duties, electric utilities and ILECs lack expertise in moving each other's attachments and union agreements prohibit such activity anyway, ILECs and

---

[18] *Coalition* Comments at 76-78.

[19] *See* Sunesys Comments at 19 ("Sunesys does not believe that this rule is fair to utilities and Sunesys believes that the best way to advance broadband deployment is to ensure that utilities receive all undisputed make-ready costs in advance.")

[20] *Coalition* Comments at 63-76.

electric utility pole owners cannot make decisions affecting the other's business, solely-owned poles are so commonly interspersed with jointly-owned poles that attachers would need to deal with both pole owners anyway, and the Commission has no authority to mandate any of these burdensome new requirements in any event.[21] As one group of electric utilities explained, this collection of make-ready proposals would transform a limited section 224(f) access right into a right to "commandeer the utility's resources and facilities to complete the make-ready process on the applicant's Commission-dictated terms and conditions."[22]

It is extremely telling that these proposals originating in the National Broadband Plan received little if any support from the attaching entities they were designed to benefit. The only conclusion that can be drawn from this lackluster response from the attacher community is that these far-reaching proposals actually would do little to benefit prospective attachers or to facilitate the deployment of broadband services. Accordingly, they should be rejected.

B. Reasonable and Workable Unauthorized Attachment and Safety Violation Penalties Should and Can Easily Be Implemented

To address the epidemic problems of unauthorized and unsafe attachments, the *Coalition* proposed that the Commission adopt unauthorized attachment penalties and safety violation penalties similar to those in effect in Oregon. Specifically, the *Coalition* proposed unauthorized attachment penalties in the following amounts:

- $100 per unauthorized attachment plus 5 years annual rental if an unauthorized attachment is found and the attacher has not participated in a required audit;
- $50 per unauthorized attachment plus 5 years annual rental if the attacher does participate in the audit or identifies the unauthorized attachment on its own.[23]

---

[21] *Id.*

[22] Comments of the Alliance for Fair Pole Attachment Rules (filed Aug. 16, 2010) at 38 ("Alliance Comments").

[23] *Coalition* Comments at 100-01.

The *Coalition* also proposed that the Commission adopt the $200 safety violation penalty in effect in Oregon.[24]

Comments regarding the Oregon proposal show that the penalties in effect in Oregon have accomplished their goals by reducing the number of unauthorized attachments and safety violations in that state. Certain operational issues raised by commenters, which are addressed below, can easily be resolved. For these reasons, the Commission should take responsible measures to combat these problems by adopting the penalties proposed by the *Coalition.*

1. Unauthorized attachment and safety violation penalties such as those in effect in Oregon can be implemented without Oregon's comprehensive pole inspection program

NCTA, Comcast and Charter all contend that the Oregon penalty rules cannot work nationwide because they would require too many resources to put the program in place. NCTA, for example, explains these resource concerns as follows:

> The Oregon Joint Use Association (OJUA) and the Oregon Public Utility Commission actively monitor the pole inspection process by all state pole owners and attachers and devote significant state resources to the program's oversight and to resolving the many disputes that arise among the parties under this regime. The Commission does not have the authority or manpower to institute a similarly broad inspection program in all 30 non-certified states.[25]

There is no need, however, for the Commission to impose the same extensive pole inspection requirements that are in place in Oregon. The identification of unauthorized attachments and safety violations would simply be accomplished as it is today. Comcast agrees

---

[24] *Id.* at 102.

[25] Comments of the National Cable & Telecommunications Association (filed Aug. 16, 2010) at 48 ("NCTA Comments"); *See also* Comcast Comments at 37 ("Initially, it should be noted that the Oregon PUC's unauthorized attachment rules are only one piece of a broader pole attachment regulatory regime whereby the PUC involves itself in a vast array of field issues and policies that extend far beyond the Commission's experience, resources and likely (on some matters) jurisdiction."); Comments of Charter Communications, Inc. (filed Aug. 16, 2010) at 28 ("Charter Comments") ("The Oregon Penalty Regime Is Unworkable On a Nationwide Basis, Would Create Disputes And Divert Resources From Broadband Deployment").

that the existing system of identifying unauthorized attachments works,[26] and NCTA claims that cable companies already comply with the rules.[27] No drastic oversight will be required. The Commission need not get involved in unauthorized attachment or safety violation disputes any more than it does currently.

2. There is no reason to fear that the penalties will be abused

The cable industry commenters note that Oregon reduced its unauthorized attachment sanction from a higher level to its current level because of allegations of utility abuse.[28] What they fail to point out, however, is that Oregon left in place significant penalties of $200 per safety violation and $100 per unauthorized attachment if there is no participation in an audit.[29] Apparently, after addressing cable company allegations, Oregon determined that such significant sanctions would serve as adequate deterrents and not be subject to abuse.

3. Attaching entities should be required to keep better records

The cable industry makes unsupported claims of poor electric utility recordkeeping and enumerates the ways that such recordkeeping makes utility claims of unauthorized attachments unreliable.[30] Comcast, for example, claims that "the situation is significantly aggravated by

---

[26] *See* Comcast Comments at 37 ("[T]he lack of disputes at the Commission over this [unauthorized attachment] issue since the policy was adopted almost a decade ago provides solid evidence that attachers and pole owners are able to work these issues out themselves.").

[27] *See* NCTA Comments at 44 ("Cable attachers have a strong interest in ensuring that their attachments to poles are properly permitted and that all their facilities are compliant with applicable safety codes and will not be disrupted due to improper pole engineering practices. They care about the safety of their employees and community residents, and they are subject to legal requirements that demand careful attention to safety compliance, proper permitting and maintenance of reliable plant. They also have incentives to ensure that billing records are accurate.")

[28] *See* Comcast Comments at 38 ("Ironically, after much litigation, the PUC's unauthorized attachment sanction (while initially set in 2000 at 30 times back rent for each unauthorized attachment) was reformed in 2007 as a result of utility abuse to now mimic the Commission's five-year back rent policy."); NCTA Comments at 48-49 ("In revising the rules, the Oregon Public Utility observed that 'pole occupants have asserted that sanctions rules have been abused as sources of revenue by pole owners,' and stated that it was adopting the changed unauthorized attachment penalty structure to 'allow [] sanctions to provide an incentive for compliance without allowing for possible abuses.' The Oregon experience shows that a draconian approach of high penalties is not workable.").

[29] Oregon Administrative Rules, Sections 860-028-0150(1) and 860-028-0140(2)(b).

[30] *See* Comcast Comments at 35; Charter Comments at 27.

systemic errors in utility recordkeeping and other utility practices that dramatically skew the number of unauthorized attachments reported in their 'studies.'"[31]

Most of these "errors" in utility recordkeeping, however, could be resolved if the attaching entities themselves kept reliable records of their own attachment permits. Unfortunately they do not, so when presented with the opportunity to prove that they have received permission from the utility to attach to a certain pole, they can provide nothing in support other than their claim that the attachment was "authorized."

The burden to demonstrate that an attachment to a utility pole is authorized should be on the entity that claims it has been authorized to attach to the pole. If NCTA is correct that "attachers have an equally strong interest in ensuring that billing records are accurate,"[32] they should have no trouble proving that their attachments have been authorized by the pole owner.

4. The *Coalition* agrees that a baseline of attachments should be established under certain conditions prior to assessing unauthorized attachment penalties

If the Commission decides to impose unauthorized attachment penalties, Time Warner Cable proposes that the Commission use the approach adopted in New York, whereby pole owners and attachers establish a common baseline of attachments prior to assessing unauthorized attachment penalties.[33]

The *Coalition of Concerned Utilities* is willing to support this proposal with certain qualifications. First, if the parties agree, the baseline can be established either using the utility's existing pole attachment database, the attacher's records, or an inventory. Second, if an inventory has been performed recently (within the past 5-10 years), then no new baseline is

---

[31] Comcast Comments at 34.

[32] NCTA Comments at v.

[33] TWC Comments at 34.

required. Third, as in the New York Order, pole owners should remain fully entitled to back billing for unauthorized attachments found during the baseline, with only the penalty assessment waived.[34]

C. To Resolve Disputes, The *Coalition* Agrees That Disputes Should Be Elevated To Appropriate Decision-Making Personnel Prior To The Filing Of A Complaint

In their Comments, TWTC/Comptel contend that many problems can be resolved informally if the appropriate person can be reached to discuss the dispute. To assist in dispute resolution, TWTC/Comptel suggest that utility pole owners identify persons with decision-making authority regarding pole attachment disputes so problems can be escalated to the appropriate person.[35]

The *Coalition of Concerned Utilities* agrees that many disputes might be avoided by simply discussing the issue with the appropriate person, and supports this concept of escalating disputes to persons with decision-making authority prior to filing any dispute with the Commission. To be successful, however, this requirement must apply to both the attaching entity and the pole owner. In the *Coalition's* experience, obstinate field personnel working for attaching entities sometimes will refuse to work constructively with utility pole owners. The ability to take a dispute to the next level in the attacher's organization would be useful.

---

[34] Case 03-M-0432 – Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, *Order Adopting Policy Statement on Pole Attachments*, Appendix A, "Policy Statement on Pole Attachments, at 10, (NY PSC Aug. 6, 2004) ("New York Order") ("After the stipulation or audit is completed, unlicensed attachments found will result in a rate of three times the pole rental per attachment back to the date of the stipulation or audit. Until a stipulation or audit is completed, provisions for unlicensed attachments in pole attachments agreements will remain in effect.")

[35] TWTC/Comptel Comments at 35.

D. The Commission Should Reject Proposals To Require The Posting Of Pole Attachment Agreements And To Allow Any Party To "Opt-In" To Those Agreements

TWTC/Comptel and MetroPCS propose to require pole owners to post a model pole attachment contract on their websites that any attacher can "opt into."[36] This proposal should be rejected for a number of reasons.

First, there is no single, one-size-fits-all contract that would be readily available for use by attachers. Utilities would no more be able to post a model contract that attachers could simply "opt into" than cable programmers would be able to post a model programming agreement that competing multichannel video providers could opt into.

Pole attachment negotiations can be complex. Few contracts are cut and paste. They cover a wide variety of issues of importance to the parties and involve give-and-take on both sides. A concession on the part of a utility to a request by an attacher might be reflected in a concession by the attacher to a request by the utility. None of these concessions would necessarily be able to all attachers who wish to "opt into" them.

For security reasons, pole attachment agreements do not fall within the public domain. Typically, only entities that are operating in an electric utility's service area with proper operating certificates are allowed to see an electric utility's pole attachment agreements. Pole attachment agreements also often contain confidential business information and are protected by confidentiality requirements. At the insistence of both parties, they are not and should not be routinely available for public inspection.

Many pole attachments agreements may have been originally executed 10, 20 or more years ago. Because communications and attachment technologies change so rapidly, many

[36] *See* TWTC/Comptel Comments at 19; MetroPCS Comments at 16

existing agreements may well have been modified or superseded, or may need to be modified next year. "Opting in" to these agreements is inappropriate on that basis, as well.

E. The FCC's Proposed Telecom Rate Is Poor Public Policy, Contrary To The Intent Of Congress, And Not The Best Solution To Promoting Broadband Services

As expected, communications attachers overwhelmingly applaud the Commission for proposing to lower the existing Telecom rate by simply removing three of the five so-called "carrying charges" from the calculation of costs for which the pole owner can be reimbursed under the rate formula. Some want the rate lowered even further by changing the way the Commission calculates the carrying charges used in the formula and the presumptions used to determine pole height and the number of attaching entities. The cable companies in particular, who previously had been lukewarm to the concept of leveling the playing field for CLEC attachers, now suddenly insist that a reduction in the Telecom rate is one of the keys to ensuring robust broadband deployment since they may soon find their VoIP and other Internet services classified as telecommunications service subject to the telecommunications rate.

Underlying the Commission's proposal to lower the Telecom rate is a desire to promote the deployment of broadband in unserved rural areas.[37] As explained below, however, tinkering with the Telecom rate, even if it were possible from a legal perspective, is no way to accomplish this goal. The only thing the Commission's proposed Telecom rate will ensure is that vast sums of money will be transferred from already overburdened electric utility ratepayers to highly profitable communications companies that have shown little interest in offering improved broadband service to rural America or any other unprofitable area.

[37] Further Notice at ¶115 and n. 311.

1. Communications company suggestions that low pole attachment rates will bring broadband to rural America are false

As the communications attachers explain it, high pole attachment rates are preventing them from providing broadband service to rural America.[38] Pretending to care about unserved areas of the country, Comcast cites the National Broadband Plan's claim that the expense of permits and leasing pole attachments can be 20% of fiber optic deployment costs, cites the Sixth Broadband Deployment Report that 14-24 million Americans do not have access to broadband today, and then applauds the FCC for proposing to reduce the level as low as possible.[39]

These suggestions from Comcast and others that all the Commission needs to bring broadband to rural America is to reduce pole attachment rates is ridiculous. Attachment rates for cable operators have been kept artificially low for decades, and cable operators have not yet provided broadband to these far reaches of rural America even with attachment rates already extremely low. There is absolutely no reason to think that they or any other provider will do so if the pole attachment rates are reduced even further.

Cable operators have reached the limit to where they can profitably build out, and they have no intention of going any farther because it makes no economic sense for them to do so. Further reductions in the already subsidized pole attachment rates will make little or no difference in broadband penetration rates.

---

[38] *See, e.g.,* Comments of CenturyLink (filed Aug. 16, 2010) at 9 ("CenturyLink Comments") ("A low, unified rate cap for pole attachment rates will promote broadband investment, especially in rural areas."); NCTA Comments at 9 ("[A]ny strategy to promote increased deployment and adoption of broadband must take steps to improve the business case for investing in broadband facilities, particularly in rural areas."); ACA Comments at 3 ("Retention of the existing cable pole attachment rate for cable operators providing commingled services is essential, as it has been instrumental in the ability of smaller cable operators to deploy broadband facilities and offer advanced services in smaller markets and sparsely populated rural areas. Rural and small market providers already face significant hurdles to deploying and upgrading their broadband networks, as they generally must attach their equipment to a greater number of poles than their urban counterparts, yet have fewer subscribers per mile over which to spread the costs.").

[39] Comcast Comments at 8-9.

Comments filed by the National Rural Electric Cooperative Association ("NRECA") confirm that high pole attachment rates are not standing in the way of cable operator provision of broadband to rural America. A survey conducted by NRECA showed that attachment rates charged by electric cooperatives were lowest where there were fewer than four customers per mile of line.[40] To serve these areas, cable operators need to be incentivized by more than low pole attachment rates.

Charter claims that because of the low number of poles per mile in rural communities, pole attachment rates are a major factor in determining whether Charter should serve a particular rural area.[41] This claim rings hollow, because pole attachment rates are a miniscule expense when compared with all of the other costs that cable operators must incur in order to deploy broadband in rural America.

As explained in the *Coalition's* Comments,[42] Cox Communications' Executive Vice President and Chief Strategy and Product Officer Dallas Clement confirmed in a workshop before the FCC last year that pole attachment rates have little if anything to do with the cable industry's failure to deploy VoIP or high speed broadband services in rural areas. Instead, capital expenditures, insufficient potential revenues and higher operating expenses that do not even include pole attachments are preventing further broadband deployment.[43] A rural cable operator testifying last year before the Arkansas Public Service Commission also explained that the primary reason the cable industry does not deploy high speed broadband or VoIP service in

---

[40] Comments of the National Rural Electric Cooperative Association (filed Aug. 16, 2010) at 27 ("NRECA Comments") (reporting that "[t]he average per pole rates for these Electric Cooperatives serving in these most sparsely populated areas of the country were $5.50 (median) and $6.33 (mean)."

[41] Charter Comments at 6.

[42] *Coalition* Comments at 120-21.

[43] *See* transcript of the FCC's National Broadband Plan Workshop, Deployment – Wired, August 12, 2009, at 76-82.

rural areas is the enormous expense associated with head-end equipment installation and system upgrades – not the relatively minute costs associated with pole attachment rentals.[44]

Neither of these conclusions should be surprising to the Commission, since pole attachment rates are only a few dollars *per pole per year*. The staff's claim in the National Broadband Plan that the expense of permits and leasing pole attachments can be "20% of fiber optic deployment costs" is wildly out of whack.[45] Pole attachment rates could be zero and it would not result in much additional broadband investment.

2. Communications companies are exploiting the Commission's interest in rural broadband development to promote their own unrelated self-interests

Although the Commission is justifiably interested in providing broadband services to rural America, it is important to recognize that at least 95% of the pole attachment subsidy that it intends to provide to CLECs and to retain for cable operators will go to areas where broadband already exists. As noted by CenturyLink, "cable companies and ILECs already offer broadband service to the great majority of customers on their networks."[46] Specifically, CenturyLink remarks that "97 percent of the U.S. ZIP codes have broadband services available from two or more providers, and 95 percent of the U.S. population lives in homes with access to wireline broadband infrastructure capable of supporting download speeds of at least 4 Mbps."[47] Under

---

[44] *See*, June 5, 2008, *Ex Parte* Communication filed by the *Coalition* in the Pole Attachment Proceeding, which is a letter describing the Declaration of Dennis R. Krumblis of Buford Media Group LLC ("Buford"), submitted by the Arkansas Cable Telecommunications Association last year in an ongoing proceeding before the Arkansas Public Service Commission.

[45] No study was performed or hearing conducted to verify this 20% figure used in the National Broadband Plan, and the costs cited at footnote 3 in Chapter 6 of the Plan do not explain the very small amount that pole attachment rentals contribute to the total.

[46] CenturyLink Comments at 19.

[47] CenturyLink Comments at 20.

the Commission's proposals, all of these areas will receive reduced pole attachment rates but none of them are unserved by broadband.

The Commission's continuation of the decades-old Cable rate subsidy is an enormous windfall to Comcast and others in the cable industry (which, when the Pole Attachment Act was enacted in 1978, was "nascent"). Now, even though the badly out-of-date windfall is no longer needed for the 95% of the population that already has broadband service, the Commission proposes to continue and compound it by extending it to CLECs as well.

Cable operators and CLECs claim that they need the windfall because it will make them more likely to invest in broadband in rural America. In reality, however, they have no economic interest in sinking investment dollars into sparsely populated areas where they will receive little or no return on their investments. Nor has the Commission proposed any requirement that the rate subsidy be linked to the provision of service in unserved areas. Instead, large, established cable and telecom companies will be free to pocket the rate subsidy available on poles located in areas already receiving broadband service without being required to use it to provide *any* additional service to unserved areas.

Attachers like Comcast and CenturyLink make certain vague claims that if they had more money, broadband rates would be lower and they would have more money to invest in facilities necessary to provide valuable services.[48] Unfortunately, however, the pole attachment rate subsidy proposed by the Commission is so unfocussed that the Commission will have no idea

[48] *See, e.g.*, Comcast Comments at 24 ("[C]onsistent with common sense, higher pole rents translate directly into higher costs to consumers of broadband services. If telecommunications pole rents are reduced, an important cost input for broadband services will decline and provide an opportunity for reduced prices for customers."); CenturyLink Comments at 10 ("High attachment rates unquestionably discourage investment. They prevent ILECs from deploying broadband in some unserved areas that would otherwise be viable for service and many underserved areas that would otherwise be viable for more advanced services. They handicap investment and network upgrades in all areas, by leaving fewer dollars available for actual infrastructure investment.").

where the savings will be spent. Rather than invest in broadband services to rural America, the money is likely to be used elsewhere. It could simply be used by the cable operators and CLECs as a competitive wedge to lower the cost that consumers pay for video services, or it could be used to pay ESPN more for its programming. It could be used to lower the costs for both video and broadband services in suburban America where competition already is forcing service providers to lower their rates. Or it could be used by Brian Roberts and other Comcast executives to pay themselves even higher bonuses. In any event, there is no guarantee that it will be used to bring broadband service to rural America.

The Commission's unfocussed subsidy is the equivalent of the federal government giving hundreds of millions of dollars in cash to cable television and CLEC providers every year with no restrictions whatsoever on how that money should be spent. Worse than that, the vast sums of money being given without restriction to highly profitable cable and CLEC companies are coming not from the federal government but from already-burdened electric utility ratepayers. Many if not all *Coalition* members are rate regulated and are required to offset their revenue requirement by the amount of revenue they receive from pole attachments.[49] The revenue reduction associated with lower pole attachment rates ultimately will be borne by electric utility ratepayers.[50]

---

[49] At the very least, the rates for Allegheny Power, BGE, FirstEnergy, National Grid, Northwestern Energy, PPL, and Wisconsin Public Service are rate regulated, requiring this offset.

[50] That electric utility ratepayers will be paying for this subsidy dollar-for-dollar is confirmed by the cable industry's own expert, Patricia Kravtin, who explains that "with respect to income or revenue-related taxes, as long as the pole attachment revenues are accounted for 'above the line,' as the utilities claim them to be, pole rate increases are ultimately offset by decreases in other utility rates dollar-for-dollar." NCTA Comments at Attachment A, Kravtin Report at ¶67. This observation by NCTA's own expert directly contradicts NCTA's assertion that "[a]lthough utilities have alleged that reducing pole attachment rates could have a harmful effect on electric ratepayers, NCTA demonstrated in its pleadings that the effect on electric ratepayers is de minimis." NCTA Comments at 34.

3. The solution to greater broadband competition is to provide a universal service fund subsidy for high-cost areas and to remove the unfocussed and ineffective electric ratepayer subsidy of cable and CLEC companies

NRECA, an organization unquestionably devoted to serving rural America, agrees with the *Coalition* that the best way to promote broadband in rural America is through specific, targeted subsidies through the USF program, with which the Commission has much experience.[51] In that way, the Commission could assure that any subsidy will be used to provide broadband service to unserved areas of rural America and other high-cost areas, instead of to line the pockets of cable and CLEC executives.

In addition to these targeted subsidies, the Commission should level the playing field among providers of broadband and other services by eliminating the existing unfair and inefficient Cable subsidy. As the Commission is well aware, competition is the key to ensuring that broadband service improves and becomes more affordable.

The ILECs have been complaining that it is unfair to them if Cable operators and CLECs are granted a lower rate but they are not.[52] The solution to this concern is not to perpetuate unfair subsidies and create a competitive advantage for ILECs by extending them to ILECs, but to increase the rate that cable operators pay at least to the level of the existing Telecom rate. According the Public Utility Commission of Ohio, ("Ohio Commission"), Congress made the Telecom rate higher than the Cable rate because CLECs were expected to compete against ILECs, and Congress believed that ILECs would be at a competitive disadvantage with respect to

---

[51] NRECA Comments at 28-29.

[52] AT&T, for example, contends that "the obvious result of creating a significantly lower broadband pole-attachment rate for telecommunications carriers only, and not an across-the-board uniform broadband rate, is to inject even more distortion into the market." Comments of AT&T Inc. (filed Aug. 16, 2010) at 3 ("AT&T Comments"). *See also* CenturyLink Comments at 9 ("Artificially high pole attachment rates for ILECs mean they are forced to incur higher costs to provide all of their services to customers when competing against CLEC and especially against cable-based providers.").

pole attachment rates if the CLEC rate were not higher.[53] Consistent with the *Coalition's* proposed solution to raise the Cable rate at least as high as the existing Telecom rate, the Ohio Commission "urges the FCC, should it decide to modify this cost methodology, to carefully consider whether doing so will allow certain attachers to have an unfair competitive advantage over pole owners with respect to pole attachment costs. The Ohio Commission believes that this result may, in fact, have the effect of deterring the deployment of broadband service in presently unserved areas."[54]

4. Congress intended the Telecom rate to be a fully-loaded rate, not a "marginal cost" or "cost causation" rate

Comcast and TWC contend that if language appears in one section of a statute but not in another, then the presumption is that Congress intended different results for the two sections.[55] Since Section 224(e) specifies the "cost of providing space" and Section 224(d) specifies other costs, the presumption must be that Congress intended that different costs be calculated under each section. We disagree.

For all of the reasons explained by the *Coalition* and others in this proceeding,[56] this presumption suggested by Comcast and TWC and embraced in the Commission's proposed reduction in the telecom rate has been overcome and would not withstand judicial scrutiny.[57] Contrary to what the Further Notice proposes and what the attachers would like, a "marginal

---

[53] Comments Submitted on Behalf of the Public Utilities Commission of Ohio (filed Aug. 16, 2010) ("Ohio Commission Comments") at 10-11.

[54] Ohio Commission Comments at 12-13.

[55] Comcast Comments at 10; TWC Comments at 10.

[56] *See Coalition* Comments at 107-08; Alliance Comments at 82-100; Comments of the Edison Electric Institute and the Utilities Telecom Council (filed Aug. 16, 2010), at 63-74 ("EEI/UTC Comments"); Comments of the Florida Investor-Owned Electric Utilities (filed Aug. 16, 2010) at 57-70 ("Florida IOU Comments"); and Oncor Electric Delivery Company LLC's Initial Comments (filed Aug. 16, 2010) at 58-65 ("Oncor Comments").

[57] *See Chevron v. Natural Res. Def. Council,* 467 U.S. 837, 842-43 (1984).

cost" or "cost causation" attachment rate for the provision of telecommunications services is not what Congress intended or required.

Flying in the face of their statutory construction arguments, the cable industry elsewhere in their Comments recognizes that Congress actually did intend that the costs to be used in the Telecom rate would be the same costs as those used in the Cable rate. This follows from the arguments of several cable operators that the Telecom rate really was designed by Congress to approximate the Cable rate once it was fully implemented. As explained by Comcast: "Congress and the Commission fully expected that expanded deployment of competitive telecommunications carriers following the 1996 Act would increase the number of attaching entities on poles thereby driving telecommunications pole rents down to the cable rate (or below)."[58] In other words, the Telecom rate was expected initially to be higher than the Cable rate, and when the number of CLECs increased as they contend Congress expected, then the Telecom rate would be reduced to the level of the Cable rate. The only way this cable operator analysis makes sense, however, is if Congress intended the costs underlying the Cable and Telecom rate to be the same.

Contrary to the Cable industry's analysis, which is unsupported by any convincing citations, it is highly unlikely that Congress or the Commission expected the Telecom rate to fall to the level of the Cable rate, because the number of attaching entities on a pole would have to reach nine before the Cable rate's 7.4% cost allocation percentage were reached.[59] Without any

---

[58] Comcast Comments at 22. *See also* NCTA Comments at 35 ("[h]ad competition developed as anticipated, with multiple providers all placing new facilities on poles, the newly added telecom rate formula would have produced rates comparable to the existing cable rate formula."); Charter Comments at 5 ("Because Congress assumed that at some point after the 1996 Act competitive telecommunications providers would thrive, Congress (and the Commission) expected the telecom rate to fall approximately the same level as the cable rate (i.e., the more attachers on the pole the lower the rate under the telecom formula)."

[59] Using the space allocation presumptions in the Telecom rate formula and 9 attaching entities results in an allocation percentage of 7.4%. $(1 + (2/3 \times 24/9)) \div 37.5 = .0741$.

legislative history or other evidence of Congressional intent, it is impossible to know how many competitors Congress expected to appear in the marketplace, but it is certain that the Commission expected no more than five attaching entities for urbanized areas and three for non-urbanized areas, since these are the presumptions that the Commission embedded into the Telecom rate formula.[60]

Because Section 224(e)(4) of the Act provides that rate increases caused by the Telecom rate must be phased in over five years,[61] it is much more likely that Congress envisioned that the Telecom rate would always remain higher than the Cable rate. Contrary to the cable industry theory that Congress expected the Telecom rate to eventually be reduced to the level of the Cable rate, the Ohio Commission's evaluation seems far more likely: that Congress wanted a higher Telecom rate to help level the pole attachment playing field between CLECs and ILECs.[62]

The Further Notice's proposed reduction in the Telecom rate is therefore contrary to Congressional intent and should be rejected.

Congress clearly required attachers to share in the utility's annual costs of owning and operating its poles, not simply to pay "marginal costs" or a rate based on "cost causation" theories. Poles depreciate, taxes are paid on them, the utility is entitled to a return on them, and there are maintenance costs and administrative costs associated with them. Consistent with Congressional intent, therefore, the Commission must allow utilities to recover all five of these carrying charges (depreciation, taxes, return, maintenance and administrative), and cannot lower the Telecom rate artificially by excluding three of them (depreciation, taxes and return).

---

[60] *See* 47 C.F.R. § 1.1417(c). The five-attacher presumption results in an 11.2% cost allocation percentage, and the three-attacher presumption yields 16.9%.

[61] 47 U.S.C. § 224(e)(4).

[62] Ohio Commission comments at 11-13.

Efforts by the cable industry and its experts to turn the Telecom rate into a "marginal cost" or "cost causation" rate show the futility of trying to calculate such a rate in any event. The testimony attached to the Comments of NCTA and Comcast calculate the existing Telecom rate through a number of contortions to arrive at a rate (a "marginal cost proxy") that NCTA for its part claims "captures the true costs caused by pole attachments (that are not captured by make-ready or other direct reimbursements to the utility) and measures and allocates these costs in a simple and expeditious manner."[63] Like NCTA, Comcast claims that "make-ready payments constitute virtually all marginal costs that arise from a pole attachment."[64]

The problem with these analyses is that neither of the experts actually knows the true level of a utility pole owner's "marginal costs." Both analyses are flawed, because neither considers that make-ready costs are only the very beginning of a long list of costs incurred by electric utilities in accommodating communications attachments, as the *Coalition* explained in its Comments.[65] None of those costs were incorporated into the NCTA and Comcast analyses.

The cable industry's "marginal cost proxy" is therefore a myth, since the experts retained by the Cable industry have no idea what the marginal costs of pole attachments really are.

---

[63] NCTA Comments at 19.

[64] Comcast Comments at 16.

[65] *Coalition* Comments at 112 (explaining that in addition to make-ready costs, "marginal" costs include, but are not limited to, "(i) constructing pole distribution systems that are taller and more expensive than the utilities need for their own purposes; (ii) replacing those poles more often than they otherwise would have to; (iii) employing teams of pole attachment personnel to manage attachments; (iv) employing countless other utility employees who devote substantial time to providing operational, engineering, legal and management support but are not employed full time to manage attachments; (v) developing recordkeeping systems, work management systems, billing systems and notification systems; (vi) negotiating contracts with attachers; (vii) complying with regulatory and safety code requirements for attachers; (viii) satisfying increased insurance requirements; (ix) dealing with increased liability issues; and (x) employing legal counsel to provide advice regarding contracting and regulatory requirements (not to mention participating in FCC rulemaking proceedings related to attachments)."

5. Forbearance authority cannot be used to reduce the Telecom rate and public policy does not support its use in any event

The cable industry argues that the Commission may exercise its Section 10(a) forbearance authority to lower the Telecom rate based on the fiction that the Telecom rate really was designed to approximate the Cable rate once it was fully implemented. As articulated by Comcast: "Congress and the Commission fully expected that expanded deployment of competitive telecommunications carriers following the 1996 Act would increase the number of attaching entities on poles thereby driving telecommunications pole rents down to the cable rate (or below)."[66] As mentioned above, NCTA and Charter repeat this novel claim,[67] but not one of these cable entities provides proof to support it.

Section 10(a) forbearance authority is inapplicable to the Pole Attachment Act. As many Comments already have pointed out, Section 10(a) of the Act[68] gives the Commission authority to forbear from applying certain regulations to a telecommunications carrier.[69] The Pole Attachment Act, however, places obligations on pole owners, not telecommunications carriers. It specifies the attachment rates that utility pole owners may charge, not the rate that telecommunications carriers must pay. It is not being applied to (or enforced against) the telecom carrier. It is being applied to (and enforced against) the utility pole owner. Forbearance, therefore, is inapplicable.

---

[66] Comcast Comments at 22.

[67] *See* NCTA Comments at 35 ("[h]ad competition developed as anticipated, with multiple providers all placing new facilities on poles, the newly added telecom rate formula would have produced rates comparable to the existing cable rate formula."); Charter at 5 ("Because Congress assumed that at some point after the 1996 Act competitive telecommunications providers would thrive, Congress (and the Commission) expected the telecom rate to fall approximately the same level as the cable rate (i.e., the more attachers on the pole the lower the rate under the telecom formula)."

[68] 47 USC § 160(a).

[69] *See* Alliance Comments at 99-100; Florida IOU Comments at 69-71; NRECA Comments at 31-32.

6. Sufficient evidence does not exist to change the average pole height presumption as proposed by the cable industry

Driven by an interest in reducing the cable attachment rate even further, Comcast and NCTA request a revision in the existing Cable rate to change the average pole height presumption from 37.5 feet to 40 feet, which would increase to 16 feet the amount of usable space on the pole and therefore correspondingly reduce the Cable rate allocation percentage from 7.4% (1/13.5) to 6.25% (1/16).[70] They claim that the average pole height presumption should be adjusted to reflect the fact that poles today are taller than they were when the pole height presumptions were adopted.[71]

Comcast and NCTA's claim of 40-foot average pole heights, however, is contradicted by Time Warner Cable, which asserts that the poles used by cable operators are much shorter. TWC contends that the pole that cable operators typically rely upon are "35-40 foot distribution poles and 25-30 foot drop poles."[72]

Given these contradictory assertions and the lack of any actual pole height calculations or other data of record in this proceeding, there is no basis to change the average pole height presumption.

7. Changes should be made to the presumption regarding the number of attaching entities, but the evidence does not support changing the presumption to four, as proposed by the cable industry

NCTA argues that the presumption in the Telecom formula regarding the number of attaching entities should be changed to four, instead of the existing presumptions of five for

---

[70] Comcast Comments at Attachment 1, Pecaro Declaration at ¶30; NCTA Comments at 26.

[71] *Id.*

[72] TWC Comments at 7.

urbanized areas and three for non-urbanized areas.[73] TWTC and Comptel request that the Commission clarify the way that the three- and five-attacher presumptions can be rebutted.[74]

The *Coalition* supports these calls to reform the number of attaching entity presumptions, but not as envisioned by NCTA.

Establishing the average number of attaching entities per pole is often the most contentious aspect of the telecom rate calculation, because the FCC's guidance on how to calculate this number has been subject to differing interpretations. The problem for utility pole owners and attachers alike is that the distinction between "urbanized" and "non-urbanized" is unworkable in practice. Standard plant accounting (Uniform System of Accounts) does not recognize "urbanized" or "non-urbanized" designation, and utility pole owners generally do not maintain records sufficient to determine the average number of attaching entities in "urbanized" and "non-urbanized" areas as determined by the U.S. Census.[75]

Few electric service territories fall neatly into one category or the other, and it is unclear to what extent the utilities' or attachers' service territories must overlap or be encircled by "urbanized" and "non-urbanized" areas in order to trigger the differing presumptions. From a practical perspective, it is often impossible to determine where an "urbanized" area ends and a "non-urbanized" area begins. Without the ability to distinguish between "urbanized" and "non-urbanized" areas and to calculate the average numbers of attaching entities for each, many utilities by necessity have been forced to use five as the presumed number of attaching entities in their rate calculations.

---

[73] NCTA Comments at 27-28.

[74] TWTC/Comptel Comments at 21.

[75] 47 C.F.R. § 1.417.

There are a host of other unanswered questions regarding the "urbanized/non-urbanized" distinction. For example, does it apply to the utility's entire service territory or only to the specific poles at issue? What if the utility serves both urbanized and non-urbanized areas, but the attacher seeks to place attachments only in an urbanized area or a non-urbanized area? To what extent should the attachers' entire geographic service territories be considered? None of these questions is adequately answered by existing Commission decisions.[76]

The FCC's telecom rate is dramatically reduced by the application of the Commission's presumptions, as demonstrated by the chart below that compares the differences between the FCC Cable Rate and Telecom Rates based on the number of attachers. For purposes of this comparison, the FCC's presumptions relating to space occupied, common space, and pole height were used:

Responsibility Percentages

FCC Cable Rate	7.4%
FCC Telecom Rate (3 attachers)	16.9%
FCC Telecom Rate (5 attachers)	11.2%

Since a presumption of five attaching entities (or even three attaching entities) is far too high and not based in reality, it grossly overstates the actual number of attaching entities on utility poles and thereby artificially reduces the Telecom rate. In effect, the presumption of five (5) "phantom" attaching entities causes a further subsidization of attachers by pole owners. All of the added costs associated with these "phantom" attachers are borne by the utility pole owner.

[76] *See Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, at ¶¶ 64-72 (2001) ("*Consolidated Reconsideration Order*"); *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd 19859 (2002).

Table 1 below demonstrates the extent to which the Commission's presumptions regarding the number of attachers are overstated *vis-à-vis* members of the *Coalition.* The chart, submitted as part of the *Coalition's* March 7, 2008 Comments in this proceeding, identifies the number of poles owned in whole or in part by *Coalition* members that have *one* attaching entity other than the electric utility, the number with *two* additional attaching entities, the number with *three* more, and so on. As demonstrated, the Commission's presumptions of three attaching entities for "non-urbanized" areas and five attaching entities for "urbanized" areas are unrealistically high.

Table 1
ATTACHING ENTITIES PER POLE

# of Poles owned in whole or in part	BG&E	DP&L	Niagara Mohawk Power (Nat'l Grid)	Ohio Edison & Penn Power*	JCP&L*	The Illuminating Company*	Penelec*	Met-Ed*	Toledo Edison Company*
Total	382,089	322,629	762,690	751,900	510,000	407,299	496,104	340,239	255,000
One Additional Attacher†	99,693	75,592	135,835	75,190	28,678	126,033	147,767	88,047	68,519
Two Additional Attachers†	217,845	56,460	534,345	435,000	293,470	10,379	159,337	148,370	52,516
Three Additional Attachers†	12,401	11,292	35,050	130,000	157,866	1,507	7,607	19,089	3,981
Four Additional Attachers†	610	<100	2,966	20,000	N/A	111	866	2,146	209
Five Additional Attachers†	56	<100	200	2,000	N/A	0	44	355	1
> Five Additional Attachers†	TBD	<100	0	500	N/A	0	9	12	1

† Other than the electric utility.
* -- Subsidiaries of FirstEnergy.

As is apparent in Table 1, the number of poles that have more than three attaching entities (including the electric utility) is extremely low. Thirty percent of the poles owned by Jersey Central Power and Light (a FirstEnergy operating company) have more than three attaching entities, but for the remainder of the Coalition members, that figure is five percent or less.

There are several factors that help to explain why the number of attaching entities on poles owned by *Coalition* Members is far fewer than the three and five attacher presumptions used by the FCC. There is only one cable operator in most communities, and cable service does not extend to all areas reached by electric utilities. ILECs may take different routes than electric utilities or install their facilities underground. Perhaps most significantly, the number of CLEC attachments is far fewer today than the Commission envisioned when its three-attacher and five-attacher presumptions were established.

Table 2, also submitted as part of the *Coalition's* March 7, 2008 Comments, shows how cable attachments cover far less than the entire electric utility pole plant of *Coalition* members, and the very small number of CLEC attachments on *Coalition* member systems:

Table 2
POLES WITH CABLE AND CLEC ATTACHMENTS

	Allegheny Power	BG&E	DP&L	National Grid	NSTAR	JCP&L*	The Illuminating Company*	Penelec*	Met-Ed*	Toledo Edison Company*	Ohio Edison & Penn Power*
# of Poles owned in whole or in part	900,000[77]	382,089	322,629	2,303,700	388,000	510,000	407,299	496,104	340,239	255,000	751,900
# of Poles owned with at least 1 cable attacher	400,000	229,809	121,000	N/A	0	182,250	1,385	203,659	203,162	112,418	526,330
# of Poles owned with at least 1 CLEC attacher	21,000	5,954	1,119	N/A	0	682	155	14,364	14,635	212	5,000

* -- FirstEnergy Operating Companies.

All utilities have system-wide records of attachments. Rather than separate pole attachment information into "urbanized" and "non-urbanized" areas, utilities separate their pole attachment records into more useful categories. Utilities often keep their pole attachment records

[77] Does not include jointly-owned poles.

separated by city, county, tax district, zip code, service territory subdivisions, and other ways, as listed below:

Allegheny -	operating company, service center
BGE -	tax district, county, city, zip code
National Grid -	city, village, town
NSTAR -	city
Penelec -	municipality, township, crew area
MetEd -	municipality, township, crew area
Toledo Edison -	zip code
Illuminating Co. -	zip code, municipality

Given the ability of many utilities to determine more accurate counts of attaching entities based upon criteria other than "urbanized" and "non-urbanized," the unworkability of the existing "urbanized/non-urbanized" distinction, and the fact that the five-attacher and three-attacher estimates for these areas are grossly overstated, the Commission should permit utilities to develop an average number of attaching entities based upon any reasonable, well-defined geographic area. Allowing such flexibility would render rate calculations more accurate and help to lessen the subsidy that already exists in the telecom rate.

8. The ILECs confirm that joint use and joint ownership agreements balance the benefits and burdens between ILEC and electric utility pole owners

In its Comments, the *Coalition* explained that because ILECs receive considerable benefits from joint use and joint ownership agreements that third party cable and CLEC attachers do not receive, it would be unfair for ILECs to receive the same attachment rate.[78] The *Coalition* also explained that changing the rate in joint use and joint ownership agreements to favor ILECs would create an imbalance in that relationship to the detriment of the electric utilities.[79]

[78] *Coalition* Comments at 134-38.

[79] *Coalition* Comments at 145-47.

Verizon, for one, appears to agree with the *Coalition* that joint use agreements are the result of a careful balancing of obligations and benefits between pole owners:

> The joint use agreements and joint ownership agreements that Verizon has entered with utilities do not provide significant financial benefits or more favorable terms and conditions because any benefits or favorable terms are offset by burdens and obligations. The fundamental difference between a license agreement and a joint use or joint ownership agreement is that the latter generally imposes mutual obligations on both parties.[80]

Like Verizon, the *Coalition* believes that the benefits of joint use and joint ownership agreements are offset by burdens and obligations. Such balancing of benefits and obligations is necessary in order for the joint use relationship to work. One of the "burdens" for Verizon and other ILEC pole owners in joint use agreements is that they need to pay more pole costs than they would if they were not joint pole owners. But these higher pole costs, as Verizon's Comments admit, are offset by greater benefits. Joint use and joint ownership agreements are essentially designed to be neutral for the pole owners.

In their Comments, the ILECs make claims regarding certain unusual conditions that allegedly make their joint use relationship unfair. AT&T, for example, claims that after it pays for a certain number of feet of space on an electric utility pole, the electric utility can rent any space that is not needed by AT&T to third party attachers and collect rent.[81] *Coalition* members do not understand this contention, since ILECs generally receive whatever space is reserved for them, but in the rare instances where this may occur, it would cut both ways. Allegheny Power, for one, rents 6-8 feet of space from ILECs on the joint use poles that the ILECs own, but it may only use three feet or less and the ILECs may be renting the unused space to a communications company.

---

[80] Verizon Comments at 18.

[81] AT&T Comments at 13.

Without any elaboration or support, Verizon makes a claim that it is paying an unnamed Pennsylvania electric utility $96.36 under a joint use agreement, effectively paying 80% of the electric utility's total pole costs.[82] The *Coalition* members operating in Pennsylvania (Allegheny Power, FirstEnergy and PPL) have no knowledge of such an arrangement, but what is missing from Verizon's claim (besides proof) is that joint ownership obligations are mutual, and the electric utility likely is also paying a large portion of Verizon's pole costs.

PPL, for example, has joint use agreements with four Verizon operating companies in Pennsylvania, under which PPL calculates that it pays 84.47%, 92.02%, 148.07% and 170.96% of Verizon's annual costs per pole for these Verizon operating companies. PPL has been trying to get out of this unfair arrangement with Verizon for more than two years, with no success. PPL's lack of success in negotiating a more reasonable rental arrangement with Verizon belies ILEC claims that they lack bargaining power in the joint use and joint ownership relationship. As the *Coalition* has explained, ILEC have considerable bargaining power that ILECs have been abusing because they are completely dependent upon ILECs for access to ILEC-owned poles, no matter how many poles they may own.[83]

[82] Verizon Comments at 4-5.

[83] *Coalition* Comments at 147-50.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the *Coalition of Concerned Utilities* urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully Submitted,

COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
National Grid
NSTAR
PPL Electric Utilities
South Dakota Electric Utilities
Wisconsin Public Service Company

By: _____
Jack Richards

_____
Thomas B. Magee

Keller and Heckman LLP
1001 G Street, NW, Suite 500W
Washington, D.C.
(202) 434-4100

Attorneys for the
Coalition of Concerned Utilities